

CHAPTER 8

APPEALS TO THE COMMISSION

I. INTRODUCTION

Section 1614.402(a) provides that appeals to the Commission must be filed by an appellant **within thirty (30) days**¹ of receipt of an agency's dismissal or final decision. If the complainant is represented by an attorney, the 30 day time limit shall begin to run from the date of receipt by the attorney, of the notice of dismissal or notice of final decision. The appeal of an agency final decision or dismissal must be filed with the following:

Director, Office of Federal Operations,
Equal Employment Opportunity Commission,
P.O. Box 19848
Washington, D.C. 20036.

hand delivered to:

Director, Office of Federal Operations,
Equal Employment Opportunity Commission,
1801 L Street N.W. 5th Floor
Washington, D.C. 20507

or facsimile sent to:

(202) 663-7022

A copy of the appeal must also be filed with the agency's EEO Director (or whomever is designated by the agency in its final decision).

The appellant should use EEOC Form 573, Notice of Appeal/Petition. See form

¹ All time limits stated in this Management Directive are in calendar days. The time limits in Part 1614 are subject to waiver, estoppel, and equitable tolling. 29 C.F.R. § 1614.604(c). For further guidance, see EEOC Compliance Manual, Volume II, Section 605.

attached to Chapter 4 of this directive. The agency shall attach a copy of EEOC Form 573 to all final decisions and dismissals of equal employment complaints.

II. PERSONS WHO MAY APPEAL

The Commission's regulations governing appeals to the Commission are located at subpart D of part 1614. Section 1614.401 sets out who may appeal to the Commission when an issue of employment discrimination is raised either alone or in connection with a grievance, settlement, or a Merit Systems Protection Board (MSPB) matter.

A. A Complainant May Appeal

1. An agency's final decision or the agency's dismissal of all or a portion of a complaint.
2. An agency's alleged non-compliance with a settlement agreement in accordance with section 1614.504.

B. A Class Agent May Appeal

1. A final agency decision on a class complaint.²
2. A final agency decision on a petition to vacate a settlement agreement in the class action.³
3. An agency's alleged non-compliance with a settlement agreement in accordance with section 1614.504.

² Included is a dismissal of a complaint that does not meet the prerequisites of a class complaint as enumerated in section 1614.204(a)(2) where the decision to dismiss informs the class agent that the complaint is being filed as an individual complaint.

³ See § 1614.204(g)(4). A petition to vacate a settlement agreement may be filed if the settlement agreement favors only the class agent or is not fair and reasonable. The agency's decision on the petition is appealable by the agent as well as class members.

C. A Class Member May Appeal

1. A final agency decision on a claim for individual relief under a class complaint.
2. A final agency decision on a petition to vacate a settlement agreement in a class action.⁴
3. An agency's alleged non-compliance with a settlement agreement in accordance with section 1614.504.

D. A Grievant May Appeal

1. A final decision of the agency.
2. A final decision of the arbitrator.
3. A final decision of the Federal Labor Relations Authority (FLRA) on the grievance.
4. **Exception:** A grievant may not appeal under subpart D of part 1614, when the matter initially raised in the negotiated grievance procedure is:
 - a. still ongoing in that process,
 - b. in arbitration,
 - c. before the FLRA,
 - d. appealable to the Merit Systems Protection Board (MSPB), or
 - e. if 5 U.S.C. § 7121(d) is inapplicable to the involved agency.

⁴ Id.

III. FILING THE APPEAL AND AGENCY RESPONSE

A. Briefs and Supporting Documents

The appellant shall have **thirty (30) days** from the filing of the appeal to submit a brief and any other documents in support of the appeal. The original must be submitted to the Director, Office of Federal Operations.

A copy of the brief and any other supporting documents must be sent to the agency, within the 30 day limit, and the appellant's submission must include proof of service on the agency. Appellants must ensure that the agency's copy of any statement or brief in support of the appeal is submitted to the designated agency representative, and not just to the agency's Civil Rights/EEO office. A copy of the agency statement or brief in opposition to the appeal must be sent to the appellant, and the agency's submission must also include proof of service on the appellant. Failure by either party to include proof of service with supporting documents or comments, or failure to provide such materials within the established time frame, may result in the materials not being considered in the appellate review.

Requests for an extension of time to submit supporting documents or comments in rebuttal must be made in writing before the time limit for such submission expires.

B. The Agency Response

After receiving the appeal and any brief from the complainant in support of the appeal, the Director, Office of Federal Operations (OFO), will request the complaint file from the agency. The agency must submit to the Director, Office of Federal Operations, the complaint file and any agency statement or brief in opposition to the appeal **within thirty (30) days** of the date on which OFO requests the complaint file. Submission of the agency's complaint file shall not be delayed for purposes of including additional comments. Failure to provide the complaint file within the prescribed time frame may result in the Commission drawing an inference adverse to the agency.

IV. APPELLATE PROCEDURE

A. Appeal Will Be Acknowledged

The appeal will be docketed upon receipt in the Office of Federal Operations and will be acknowledged in writing.

B. Where Record is Complete

Where the record is complete, OFO shall issue a decision in accordance with section 1614.405.

C. Where Record Requires Supplementation

While the Commission retains the right to supplement the record of appeal, it is intended that this provision will be used only in rare instances to avoid a miscarriage of justice.

1. Where the record requires supplementation, OFO may require additional information from one or both of the parties. OFO may supplement the record by an exchange of letters, memoranda, or investigation. Each party shall provide copies of such supplemental information to the other party at the time it is submitted to OFO.
2. Where the record is so incomplete as to require remand to the agency in order to complete the investigation, the Commission shall designate a time period between **thirty (30)** and **ninety (90) days** within which the agency must complete the investigation. During the period of remand, the appeal will be held in abeyance and the matter will be monitored by OFO. Upon completion of the investigation, the agency must provide the complainant with a copy of its supplemental findings and return the completed record to OFO. The complainant may, **within 30 days** of receipt of the supplemental record, submit a statement concerning the supplemental record to OFO. Upon receipt by OFO, the supplemental record will be included in the appeal file and processed appropriately.

V. RECONSIDERATION**A. Reconsideration is Not an Appeal**

A request for reconsideration is not a second appeal to the Commission. Such requests must contain arguments or evidence which establish that:

1. new and material evidence is available that was not readily available when the previous decision was issued; or
2. the previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or
3. the decision is of such exceptional nature as to have substantial precedential implications.

B. Reconsideration Procedures

1. Requests for reconsideration and any supporting statement or brief must be filed with OFO **within thirty (30) days** of receipt of a decision of the Commission or **within twenty (20) days** of receipt of another party's timely request for reconsideration.
2. The requesting party must submit any supporting documents or brief at the time the request is filed. The request must also include proof of service on the opposing party.
3. The opposing party shall have **twenty (20) days** from the date of service in which to submit any statement or brief in opposition. Such statement or brief must be served on the requesting party and proof of service must be included with the submission to OFO.
4. Failure to provide a proof of service or to submit comments within the prescribed time frame may result in the return of the submission.

5. Requests for an extension of the time to submit opposing comments must be made in writing before the time for such submissions has expired.

C. Reconsideration Decision is Final

The Commission's decision on a request for reconsideration is final, and there is no further right by either party to request reconsideration, unless the decision remanded the complaint for further processing.

VI. REMEDIES

A. An Agency Shall Provide Full Relief After Finding Discrimination

When an agency or the Commission finds that an applicant or employee has been discriminated against, the agency shall provide full relief as explained in part 1614. See also Chapter 9 of the directive.

B. Types of Relief Available

Relief shall include the following elements in appropriate circumstances.

1. A notification to all employees of the agency in the affected facility of their right to be free from unlawful discrimination and assurance that the particular types of discrimination will not recur.
2. A commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur.
3. An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position.
4. A payment to each identified victim of discrimination on a make whole basis for any loss of earnings and benefits the person may have suffered as a result of the discrimination.

5. A commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

C. Clear and Convincing Standard Needed to Avoid Liability: Duty to Cure Discrimination Remains

1. When an agency or the Commission finds that discrimination existed, but also finds by clear and convincing evidence that the agency would have made the same employment decision even absent the discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure that it does not recur.
2. Back pay, computed in the manner prescribed by 5 C.F.R. § 550.805, shall be awarded from the date the individual would have entered on duty unless clear and convincing evidence indicates that the applicant or employee would not have been selected for the position even absent discrimination. Complainant has the obligation to mitigate damages. See Chapter 9, section III.A.

D. Interest on Back Pay

Interest on back pay shall be included in the back pay computation.

E. Offer of a Position Must Be in Writing

When the relief ordered includes the offer of a position or a promotion, the offer shall be made to the complainant in writing, providing the complainant 15 days from receipt of the offer to notify the agency of the acceptance or rejection. Failure to respond within the 15-day time limit shall be construed as a declination. Any back pay liability shall cease to accrue with either the actual placement of the complainant into the position in question, or with the date the offer was declined.

F. Attorney's Fees - 29 C.F.R. § 1614.501(e)

1. Attorney's fees and costs may be provided to a complainant as part of a settlement pursuant to section 1614.603. Section 1614.501(e)

sets out in detail the requirements and limitations on the award of attorney's fees and costs.

2. A finding of discrimination raises a presumption of entitlement to an award of attorney's fees. § 1614.501(e)(1)(i).
 - a. Any award of attorney's fees or costs shall be paid by the agency. § 1614.501(e)(1)(ii).
 - b. No award is allowable for the services of any employee of the Federal government. § 1614.501(e)(1)(iii).
3. Attorney's fees are allowable only for the services of:
 - a. members of the Bar,
 - b. law clerks and paralegals, and
 - c. law students under the supervision of members of the Bar. § 1614.501(e)(1)(iii).
4. Attorney's fees may not be payable under certain circumstances.
 - a. An agency is not required to pay attorney's fees before the filing of a formal complaint and before the complainant has notified the agency that he or she is represented by an attorney. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation. § 1614.501(e)(1)(iv).

Exception: Fees are allowable for a reasonable period of time prior to the notification of representation (which may include time prior to the filing of the written complaint) for any services performed in reaching a determination to represent the complainant.

- b. Attorney's fees are not recovered at the administrative level under the Age discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA). See Palmer v. General Services Administration, 787 F.2d 300 (8th Cir. 1986).
- 5. Attorneys (or complainants, if attorney's fees have been paid by the complainant in advance) shall submit a claim for payment to the agency **within 30 calendar days** of receipt of a decision in which attorneys fees have been awarded. § 1614.501(e)(2).
- 6. The agency shall pay the amount claimed in full, or issue a decision with appeal rights where the amount claimed is partially paid or rejected in full. Amounts not in dispute shall be paid even where disputed amounts are in the appellate process.
§ 1614.501(e)(2)(ii)(A).

G. Computation of Service Time

When an individual accepts an offer of employment as a remedy for discrimination, (s)he shall be deemed to have performed service for the agency during the period he would have served but for the discrimination for all purposes except for meeting service requirements for completion of a required probationary or trial period.

VII. COMPLIANCE

A. Relief Ordered in a Final Decision on Appeal

Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency unless a party files a timely request for reconsideration or the Commission on its own motion reconsiders the decision. **The relief shall be provided in full not later than sixty (60) days after receipt of the final decision unless otherwise ordered in the decision.**

B. Relief Pending a Motion for Reconsideration

In the event that the agency files a timely request for reconsideration and the case involves removal, separation or suspension continuing beyond the date of the request for reconsideration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

When no request for reconsideration is filed, or when such a request is denied, the agency shall provide the relief ordered and there is no further right to delay the implementation of the ordered relief. **The relief shall be provided in full not later than sixty (60) days after receipt of the final decision unless otherwise ordered in the decision.**

C. Complainant May File an Appeal Alleging a Breach of a Settlement Agreement

Where a complainant files an appeal alleging a breach of a settlement agreement and OFO determines that the agreement was breached, the complainant may request enforcement of the settlement agreement or may request reinstatement of the initial complaint at the point at which the processing of the complaint was stopped.

D. Complainant May Petition the Commission for Enforcement of a Decision Issued Under the Commission's Appellate Jurisdiction.

A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to OFO, and shall set forth the reasons which lead the complainant to believe that the agency is not complying with the decision.

The petitioner shall be notified of any decision made on the petition. Subsequent to the docketing of a petition, acknowledgement letters will be sent to both parties identifying the new docket number and advising both parties of the right to submit a brief or to comment on the issue in dispute.

The Commission may issue a notice to the head of any Federal agency which has failed to comply with a decision to show cause why there is non-compliance. Such notice may request the head of the agency or his/her representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

VIII. CIVIL ACTIONS

Filing a civil action terminates Commission processing of an appeal. See sections 1614.408 and 1614.409.

IX. NOTICE REQUIREMENTS

Agencies are required to notify complainants of their rights to appeal to the Commission and to file a civil action within the specified limitations periods. Agencies must also notify complainants of their statutory right to request court appointment of counsel for representation in connection with the filing of civil actions, which arise from Title VII and the Rehabilitation Act. See Hilliard v. Volcker, 659 F.2d 1125 (D.C. Cir. 1981). Therefore, agencies that are subject to 29 C.F.R. Part 1614 are required to include the appropriate language in every final decision on complaints which allege discrimination. Sample language is provided in Chapter 10, section V.